

1. What is claimant's average weekly wage? The parties stipulated that claimant had a base wage of \$758.07, overtime of \$00.46 and an incentive bonus of \$860.00 which resulted in an additional \$16.54 per week. This calculates to \$775.07 per week. The only dispute revolves around a longevity bonus of \$1,100.00 per year which claimant qualified for as a 10-year employee and which claimant would continue receiving from that point forward.
2. What is the nature and extent of claimant's injuries? Claimant continues to work for respondent at a comparable wage, and, thus, his award is limited to a functional impairment under K.S.A. 44-510e. Claimant contends that his functional award should be 22 percent to the body as a whole based on the opinion

of Michael J. Poppa, D.O. Respondent contends the 8 percent whole person functional impairment determined by the ALJ, and based on the opinion of Greg A. Horton, M.D., should be affirmed.

FINDINGS OF FACT

Claimant began working for respondent in October 1985. His job title on September 24, 2008, was facility specialist/electrician. Claimant performed electrical work, light construction work and demolition work. On September 24, 2008, while performing his customary job duties, claimant fell four to five feet from a ladder landing on his left hip and back. Claimant was transported by ambulance to the emergency room at the University of Kansas Medical Center. X-rays displayed a previous total hip arthroplasty without fracture or dislocation. Progression of osteoarthritis of the hip was described but no hip fracture was identified. The left ankle displayed what may have been a small avulsion fracture but this was not definite. The left foot displayed osteoarthritis. A CT scan of claimant's thoracic spine revealed no evidence of fracture or subluxation. Claimant was provided conservative care and returned to work with respondent.

Claimant continued to experience symptoms and sought an evaluation with board certified orthopedic surgeon Greg A. Horton, M.D., at the University of Kansas Medical Center. Dr. Horton had performed the original arthroplasty on claimant's left hip in 2002. It was determined that claimant's hip stem had acutely displaced and settled. Claimant was referred by Dr. Horton to Dr. Hendricks for a revision of the hip arthroplasty. This was performed on November 4, 2008. Dr. Horton examined claimant post surgery on August 4, 2009. Claimant displayed mild thigh pain, and the revision had shortened claimant's left leg somewhat, although Dr. Horton described claimant's leg lengths as being relatively close. Dr. Horton had rated claimant's hip at 37 percent to the extremity after the 2002 replacement. This was the AMA *Guides*, fourth edition,¹ rating for a good result. After the examination following the most recent surgery, Dr. Horton again rated claimant at 37 percent to the extremity, finding no substantial difference in the hip, post surgery. Dr. Horton identified tables 64 and 65 of the fourth edition of the AMA *Guides*² as the basis for his determination that claimant's good result from the revision resulted in no additional functional impairment. It is noted that the score sheet from table 65 was not actually completed by Dr. Horton, although he did testify regarding some of the ratings he used in reaching his determination. This equates to a 15 percent whole person impairment for the hip injury and resulting surgery. Dr. Horton did acknowledge that claimant's symptoms had increased. He just did not believe the impairment had also increased. Dr. Horton did not examine claimant's back or left knee except during the hip examination. He disputed the finding by claimant's medical expert, board certified occupational and preventative

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

² AMA *Guides* (4th ed.).

medicine specialist Michael J. Poppa, D.O., that claimant suffered a medial collateral ligament sprain in the knee, especially since Dr. Poppa attributed some of claimant's knee impairment to an overuse of the medial collateral ligament as compensation for the hip injury. Dr. Horton testified that there was no way to put more weight on the knee due to hip pain in the same extremity.

Claimant was referred by his attorney to Dr. Poppa for an examination on February 24, 2009, approximately three and a half months post surgery. Dr. Poppa determined that claimant was at maximum medical improvement (MMI) and rated claimant at 5 percent to the whole body for the low back, 7 percent to the left lower extremity for the knee secondary to a medial collateral ligament sprain and 37 percent to the extremity, or 15 percent to the body, for the hip revision. In the report of February 24, 2009, Dr. Poppa stated the arthroplasty was to the "knee" and claimant had experienced a good result. However, at his deposition, Dr. Poppa testified that the "knee" rating was actually intended for the hip, and the result was intended to read "poor" rather than good. Thus, Dr. Poppa intended the 37 percent rating to be in addition to the original rating received by claimant in 2002. The combined ratings calculated to a 22 percent whole person functional impairment.

The only dispute relating to claimant's average weekly wage stems from the longevity bonus in the amount of \$1,100.00. Claimant qualified for this additional compensation, having accumulated ten years of service with respondent. This additional compensation will be paid yearly as long as claimant continues with respondent. As noted by the ALJ, the item is not designated as a bonus. Instead, it is identified as "Longevity Additional Compensation" on the wage statement. If included in the average weekly wage, the result would be an additional \$21.15 per week.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.³

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁴

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

³ K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

⁴ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁵

The two phrases “arising out of” and “in the course of,” as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase “in the course of” employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer’s service. The phrase “out of” the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”⁶

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.⁷

Claimant alleges entitlement to a permanent impairment to the left knee from this accident and the resulting physical disability. However, claimant’s only support for a knee impairment comes from Dr. Poppa. The explanation provided by Dr. Poppa was criticized by Dr. Horton and carries little persuasive value with the Board. The mechanics of the alleged injury to the knee while trying to relieve stress on the hip did not make sense to Dr. Horton. Additionally, the damage, if it did result from the hip problems, would have happened to the lateral side of the knee and not the medial side. The Board rejects claimant’s contention that his ongoing left knee problems stem from the accident on September 24, 2008, or from overcompensating for the left hip injury.

Claimant alleges impairment to his low back from the accident. Claimant testified that he suffered pain in his back from the fall. While at the emergency room at the University of Kansas Medical Center, claimant was tested for pain in his left hip and thoracic spine. It is understandable that involvement of the lumbar spine could have been masked with the multitude of injuries suffered by claimant. Additionally, Dr. Poppa found

⁵ K.S.A. 2008 Supp. 44-501(a).

⁶ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

⁷ K.S.A. 44-510e(a).

permanent impairment to the lumbar spine, and his opinion is basically uncontradicted. Dr. Horton did not specifically examine the back except while examining the hip. Respondent acknowledged at the oral argument to the Board that no doctor contradicted the opinion of Dr. Poppa and claimant had testified to ongoing pain in his low back. The Board finds that claimant did suffer permanent injury to his low back from the fall on September 24, 2008, and the 5 percent whole body functional impairment opinion of Dr. Poppa is appropriate. The Award of the ALJ is affirmed on this issue.

Next, the Board must consider the allegation of a permanent impairment to claimant's hip from this fall and the subsequent surgery. Dr. Horton testified that the permanent impairment did not change, even while acknowledging that claimant's symptoms had worsened. Claimant had pain in his mid thigh and a slight limp after the revision surgery. While the result might still be classified as good, the fact remains that claimant suffered additional trauma and underwent an additional surgery with a shortening of the rod in his hip. This resulted in a shortening of his left leg and a slight limp. On the other hand, Dr. Poppa's opinion raises questions. Claimant was reported with a good result in Dr. Poppa's report. At the deposition, the result suddenly became poor and the impairment doubled. Dr. Poppa did provide a completed table 65 from the *AMA Guides*, while Dr. Horton appeared to be scrambling during the deposition to explain the lack of numbers on that same table. Both opinions carry weight, but both leave questions unanswered. The Board finds the truth to lie somewhere in between. Dr. Poppa found an additional 15 percent whole body impairment, while Dr. Horton found no new impairment. The Board finds that claimant suffered an additional 7.5 percent whole person functional impairment to the hip. Utilizing the combined values chart from the fourth edition of the *AMA Guides*⁸, the Board awards claimant a 12.5 percent permanent partial whole person functional impairment for the injuries suffered on September 24, 2008.

The issue regarding the inclusion of the longevity compensation is determined in claimant's favor.

K.S.A. 44-511(a)(1) states:

(a) As used in this section: (1) The term "money" shall be construed to mean the gross remuneration, on an hourly, output, salary, commission or other basis, at which the service rendered is recompensed in money by the employer, but it shall not include any additional compensation, as defined in this section, any remuneration in any medium other than cash, or any other compensation or benefits received by the employee from the employer or any other source.

⁸ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

K.S.A. 44-511(a)(2)(B) states:

(2) The term "additional compensation" shall include and mean only the following: . . . (B) any cash bonuses paid by the employer within one year prior to the date of the accident, for which the average weekly value shall be determined by averaging all such bonuses over the period of time employed prior to the date of the accident, not to exceed 52 weeks;

K.S.A. 44-511(a)(3) states;

(3) The term "wage" shall be construed to mean the total of the money and any additional compensation which the employee receives for services rendered for the employer in whose employment the employee sustains an injury by accident arising out of and in the course of such employment.

The longevity bonus, although called a bonus, was actually identified as "Longevity Additional Compensation". Claimant qualified for the \$1,100.00 in additional compensation after completing 10 years of service with respondent. Additionally, claimant will receive the same or higher payment yearly as the result of his tenure with respondent. Rather than this guaranteed payment being seen as a bonus under K.S.A. 2008 Supp. 44-511(a)(2)(B), it appears more as a guaranteed supplement to claimant's wages. This payment is contractual, based on claimant's years of service, and not on any profit or typical bonus scenario. The Board finds that the \$1,100.00 payment is a portion of claimant's wage and not a bonus under K.S.A. 2008 Supp. 44-511(a) and, therefore, is included in the average weekly wage from claimant's date of accident on September 24, 2008. This will result in an additional \$21.15 being added to the average weekly wage for a total wage of \$796.22. The Award of the ALJ is affirmed on this issue.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified with regard to the permanent partial functional disability, increasing the award to 12.5 percent, but affirmed with regard to the computation of claimant's average weekly wage.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated January 19, 2010, should be, and is hereby, modified to award claimant a 12.5 percent permanent partial disability to the whole body on a functional basis, but affirmed with regard to the calculation of claimant's average weekly wage.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Gregory Lee Scaife, and against the respondent, the State of Kansas, and its insurance carrier, the State Self-Insurance Fund, for an accidental injury which occurred on September 24, 2008, and based upon an average weekly wage of \$796.22.

Claimant is entitled to 12.71 weeks of temporary total disability compensation at the rate of \$529.00 per week totaling \$6,723.59, followed by 51.88 weeks of permanent partial disability compensation at the rate of \$529.00 per week totaling \$27,444.52 for a 12.5 percent permanent partial whole body disability, making a total award of \$34,168.11.

As of the date of this award, the entire amount would be due and owing, and is ordered paid, minus any amounts already paid.

The record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant for approval.⁹

IT IS SO ORDERED.

Dated this ____ day of May, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Keith L. Mark, Attorney for Claimant
Bryce Benedict, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge

⁹ K.S.A. 44-536(b).